Supreme Court, U. S.
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No. 96-1167

In The

Supreme Court of the United States

October Term, 1996

SWARAN KUMAR JAIN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In its Brief in Opposition, the United States concedes that the Eighth Circuit's decision in this case conflicts with the decision of the Ninth Circuit in *Hanlester Network v. Shalala*, 51 F.3d 1390 (1995). Br. in Opp. at 8. Despite this clear and present circuit conflict, the United States argues that certiorari should be denied for two reasons: (1) "the issue in this case would benefit from further consideration in the lower courts before this Court intervenes," *id.*; and (2) Dr. Jain admitted at trial that the conduct the jury found he committed was illegal, and therefore he would have been convicted even under the higher scienter standard he now advocates. *Id.* at 9. The United States is wrong on both counts.

1. The issue presented demands immediate resolution by this Court. The Eighth and Ninth Circuits have adopted diametrically opposed positions as to the scienter required under the Medicare Fraud Act. "[F]urther consideration" by the lower courts will not sharpen or eliminate this conflict; it will simply cause unfairness to criminal defendants tried under a standard later held erroneous, and continued uncertainty within the health care industry.

The United States' current criminal enforcement priorities add further urgency to this issue. The United States does not deny that health care fraud is one of the highest criminal enforcement priorities of the Department of Justice, second only to violent crime. As a recent newspaper article noted, "[a]cross the board, federal authorities are stepping up the fight against health fraud

and other regulatory infractions." Anders & McGinley, *A New Brand of Crime now Stirs the Feds: Health Care Fraud*, WALL ST. J., May 6, 1997, at A1. The Medicare Fraud Act is a centerpiece of that effort.

The conflicting interpretations of this important criminal statute are not limited to the decisions of the court below and the Ninth Circuit in *Hanlester*. District courts in three other circuits have also reached conflicting conclusions as to the scienter required to support a conviction under the Medicare Fraud Act. Compare *United States v. Neufeld*, 908 F. Supp. 491, 497 (S.D. Ohio 1995) (refusing to follow *Hanlester*), with *Modern Medical Lab., Inc. v. Smith-Kline Beecham Clinical Lab., Inc.*, No. 92 C5302, 1994 WL 449281 (N.D. Ill. Aug. 17, 1994) (knowledge that agreement illegal sufficient to establish scienter under Medicare Fraud Act), and *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 33 (1st Cir. 1989) (jury instruction which required an "intent to violate the law" was "appropriate"). Now is the time for this Court to impose much-needed uniformity in this important area of the law.

2. The Court's resolution of the scienter issue will decide Dr. Jain's case. The Eighth Circuit's statement that Dr. Jain would have been convicted even under the *Hanlester* scienter standard, and that any defect in the jury charge was harmless error, was unnecessary and incorrect. This erroneous dictum does not justify denial of the petition.

The Eighth Circuit clearly decided the "willfulness" issue on the merits, after a lengthy analysis of relevant case law and of the Medicare Fraud Act's legislative

history and implementing regulations. App. 5-9. The court's off-hand, "[a]lternative[ ]" conclusion that the failure to use the *Ratzlaf* definition of "willfulness" was harmless error was unnecessary to the decision, and should be disregarded as dictum.

Besides being unnecessary, the Eighth Circuit's "harmless error" dictum was wrong, and rests on an erroneous reading of the trial testimony. The testimony to which the Eighth Circuit referred follows:

> Q. Did you ever ask Mr. Boillotat [North Hills Hospital's Administrator] to pay you *a certain amount per patient*?
>
> A. No, never.
>
> Q. What would be your understanding of the legality of *such a deal*?
>
> A. One, that would be stupid. Two, it would be illegal, yes.

Tr. at 1252 (emphasis added) (reprinted in the Appendix hereto at App. 36).

This exchange was in reference to testimony by a former North Hills Hospital administrator who claimed that Dr. Jain showed him a letter in which another hospital offered to pay Dr. Jain $2,500 for each patient referred. Dr. Jain's testimony that a *per-patient* payment would be illegal as irrelevant here, since the Government never alleged that Dr. Jain received a payment for each patient that he referred to North Hills Hospital. As the United States acknowledges, Petitioner was convicted based on his receipt of 19 payments totaling $40,500 from North Hills Hospital between July 1989 and October 1990. Br. in Opp. at 2. These payments were made to Petitioner on

roughly a monthly basis, based at least in part on his performance of marketing and promotional activities for the hospital. Br. in Opp. at 3. There is no evidence in the record tying these payments to the number of patients Dr. Jain referred to North Hills Hospital during this time period, and the Government did not argue at trial that the payment to Dr. Jain constituted a per-patient referral fee, or a *quid pro quo* for his referral of a particular number of patients.

Although it now places heavy reliance on this point, it is noteworthy that the United States did not make this "harmless error" argument in the Eighth Circuit. The United States' brief in the Eighth Circuit spent 12 pages discussing the appropriate definition of "willfulness" under the Medicare Fraud Act, and cited Dr. Jain's testimony as evidence that the statute was not so complex that a heightened scienter standard was required. Yet nowhere in this lengthy discussion did the United States suggest that Dr. Jain's testimony mooted his *Ratzlaf* argument. The Government's Eighth Circuit brief was signed by the Assistant United States Attorney who tried this case. Presumably she recognized that Dr. Jain's trial testimony addressed a hypothetical situation different from that presented at trial.

Moreover, during the instruction conference the district court, which had heard Dr. Jain's testimony, apparently acknowledged that Dr. Jain would be entitled to a judgment of acquittal if the *Ratzlaf* standard of willfulness applied. Tr. at 1363 ("If that was the test, I suppose that there probably is no submissible case on willfully * * * .") (reprinted in the Appendix hereto at App. 37).

CONCLUSION

The petition presents for review an issue which has divided the Courts of Appeals, is of surpassing importance to the health care industry, and demands this Court's immediate resolution. The issue is properly presented, and a reversal would alter the outcome of this case. For these reasons, and for the reasons stated more fully in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Excerpts From Trial Transcript in *United States v. Swaran Kumar Jain*

Page 1251, Line 7 through Page 1252, Line 17:

Q. Okay. And you have heard the testimony from Mr. Boillotat concerning a conversation where he says he was shown a letter by you from Mr. Rowe that said Two Rivers will pay you $2,500 per patient. Do you remember that testimony?

A. Yes, I do.

Q. Did you ever receive a letter from Mr. Rowe that had anything like a certain amount per patient?

A. No, sir.

Q. Did you ever show a letter like that to Mr. Boillotat?

A. No, sir.

Q. During this time frame, is Exhibit No. 1078 the only letter you received from Mr. Rowe?

A. That is true, sir.

Q. Does this letter say anything about payment per patient?

A. No, sir.

MR. BRADSHAW: Your Honor, I move the admission of Defendant's Exhibit No. 1078.

THE COURT: It Is Admitted Into Evidence.

(WHEREUPON, DEFENDANT'S EXHIBIT NO. 1078 IS RECEIVED IN EVIDENCE.)

Q. (By Mr. Bradshaw) Now, do you recall showing this letter to Mr. Boillotat?

A. Yes, I do.

Q. Did you ever ask Mr. Boillotat to pay you a certain amount per patient?

A. No, never.

Q. What would be your understanding of the legality of such a deal?

A. One, that would be stupid. Two, it would be illegal, yes.

Q. Would it be unethical?

A. Yes.

Page 1362, Line 5 through Page 1363, Line 11:

MR. BRADSHAW: With respect to Instruction "L", I have already commented on that.

Instruction "M", we are concerned about the second sentence in that instruction, primarily for the reasons we have argued with respect to the "B" portion of the conspiracy.

THE COURT: Well, there is some basis. I mean "willfully" is sometimes defined as intent to violate the law. So I recognize that you would take the position that you are taking.

MR. BRADSHAW: There is language in the model instruction 6.26.7201 which –

THE COURT: Six Point –

MR. BRADSHAW: 6.26.7201, and I guess in the last paragraph of the actual instruction language. I am not sure how we feel about it, but we know that language is there and we don't have to look at it tonight.

It is the same as 7203. It says acting willfully means voluntarily and intentionally to violate a known legal duty. I am not sure. Quite honestly, I like that better.

THE COURT: I know you do. If that was the test, I suppose that there probably is no submissible case on willfully, although, of course, the defendant says he thought that it was against the law.

He thought things were against the law that apparently are not, but is not intended for anything other than the CHAMPUS or Medicare is.